

1988

# Provo City Corporation v. The State of Utah, Staker Paving and Construction Company : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Carmen E. Kipp, Robert H. Rees; attorneys for respondent.

Robert H. Henderson; Snow, Christensen and Martineau; attorneys for Appellant.

---

## Recommended Citation

Brief of Appellant, *Provo City Corp v. Utah*, No. 880083.00 (Utah Supreme Court, 1988).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/1969](https://digitalcommons.law.byu.edu/byu_sc1/1969)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH  
DOCUMENT  
KFU  
45.9  
.S9  
DOCKET NO:

UTAH SUPREME COURT

BRIEF

880083

ROBERT H. HENDERSON, A1461  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Defendant/Appellant  
Staker Paving and Construction Company  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

---

IN THE SUPREME COURT OF THE STATE OF UTAH

---

PROVO CITY CORPORATION, et al.,  
Plaintiffs/Appellants,  
vs.

BRIEF OF THE APPELLANT  
STAKER PAVING & CONSTRUCTION  
COMPANY

STATE OF UTAH,  
Defendant/Respondent,

and

Case Numbers 880083  
(Consolidated) 880096  
880097

STAKER PAVING & CONSTRUCTION  
COMPANY,

Defendant/Appellant.

Priority Classification 14.b.

---

APPEAL FROM THE FOURTH DISTRICT COURT  
IN AND FOR UTAH COUNTY, STATE OF UTAH

JUDGE HARDING

CARMEN E. KIPP  
ROBERT H. REES  
Attorneys for Defendant/  
Respondent State of Utah  
City Centre I, #330  
175 East 400 South  
Salt Lake City, UT 84111-2314

ROBERT H. HENDERSON, A1461  
Snow, Christensen & Martineau  
Attorneys for Defendant/  
Appellant Staker Paving &  
Construction Company  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, UT 84145

FILED

APR 20

ROBERT H. HENDERSON, A1461  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Defendant/Appellant  
Staker Paving and Construction Company  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

---

IN THE SUPREME COURT OF THE STATE OF UTAH

---

PROVO CITY CORPORATION, et al.,

Plaintiffs/Appellants,

vs.

STATE OF UTAH,

Defendant/Respondent,

and

STAKER PAVING & CONSTRUCTION  
COMPANY,

Defendant/Appellant.

BRIEF OF THE APPELLANT  
STAKER PAVING & CONSTRUCTION  
COMPANY

Case Numbers 880083  
(Consolidated) 880096  
880097

Priority Classification 14.b.

---

APPEAL FROM THE FOURTH DISTRICT COURT  
IN AND FOR UTAH COUNTY, STATE OF UTAH

JUDGE HARDING

CARMEN E. KIPP  
ROBERT H. REES  
Attorneys for Defendant/  
Respondent State of Utah  
City Centre I, #330  
175 East 400 South  
Salt Lake City, UT 84111-2314

ROBERT H. HENDERSON, A1461  
Snow, Christensen & Martineau  
Attorneys for Defendant/  
Appellant Staker Paving &  
Construction Company  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, UT 84145

1. LIST OF ALL PARTIES

1. Provo City Corporation, plaintiff/appellant.
2. Christensen & Griffith Construction Company,  
plaintiff/appellant.
3. State of Utah, by and through its Department of  
Transportation, defendant/respondent.
4. Staker Paving & Construction Company,  
defendant/appellant.
5. Gallegos Construction Company, third-party defendant.
6. Hickiau Construction Company, third-party defendant.

## 2. TABLE OF CONTENTS

	<u>Page</u>
3. Table of Authorities . . . . .	iii
4. Statement Showing Jurisdiction and Describing Nature of Proceedings Below . . . .	1
5. Statement of the Issue . . . . .	1
6. Determinative Constitutional Provisions, Statutes, Ordinances, Rules and Regulations . .	2
7. Statement of the Case	
A. Nature of the Case . . . . .	2
B. Course of the Proceedings . . . . .	3
C. Disposition at Trial Court . . . . .	3
D. Relevant Facts with Citations to Record .	3
8. Summary of Argument . . . . .	5
9. Argument . . . . .	6
10. Conclusion and Statement of Precise Relief Sought . . . . .	8

### 3. TABLE OF AUTHORITIES

#### Statutory Authority

	<u>Page</u>
Utah Code Ann. § 78-2-2(3)(i) (Repl. 1987) . . . . .	1
Utah Code Ann. § 63-30-3 (Repl. 1986) . . . . .	1, 2, 5
Utah Rules of Civil Procedure, Rule 54(b) . . . . .	1, 3

#### Case Authority Listed Alphabetically

<u>Bowles v. State</u> , 652 P.2d 1345 (Utah 1982) . . . . .	6
<u>El Rancho Enters., Inc. v. Murray City Corp.</u> , 565 P.2d 778 (Utah 1977) . . . . .	6

#### Secondary Authority

18 C.J.S. <u>Contribution</u> § 2 (1939) . . . . .	6
Restatement (Second) of Torts § 886B (1979) . . . . .	7

4. STATEMENT SHOWING JURISDICTION AND  
DESCRIBING NATURE OF PROCEEDINGS BELOW

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(i) (Repl. 1987) and Rule 54(b) of the Utah Rules of Civil Procedure.

This appeal is from a final judgment of the Fourth District Court in and for Utah County, State of Utah. Plaintiffs sued defendants for alleged damage arising out of defendant State of Utah's diking project along Interstate 15 on the south side of Provo City in 1984. Defendant Staker Paving & Construction Company was the State of Utah's contractor for the diking project. The State of Utah moved for summary judgment as to plaintiff's claims and Staker's cross-claims on the theory that Utah Code Ann. § 63-30-3 (Repl. 1986) provides absolute immunity herein. The trial judge granted the State of Utah's motion, then certified the Order granting the State of Utah summary judgment as a "final" Order pursuant to Rule 54(b).

5. STATEMENT OF THE ISSUE

The issue presented for review is whether Utah Code Ann. § 63-30-3 (Repl. 1986) provides the State of Utah absolute immunity from its contractor's cross-claims of indemnity and contribution, even though Staker performed the work pursuant to the State's plans and specifications and under the daily

supervision and control of the State, and even though the State inspected, approved, and accepted Staker's work.

6. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,  
ORDINANCES, RULES AND REGULATIONS

Utah Code Ann. § 63-30-3 (Repl. 1986). Immunity of governmental entities from suit.

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

7. STATEMENT OF THE CASE

A. Nature of the Case: Plaintiff Provo City owns land adjacent to Interstate 15 on the south side of Provo. Plaintiff Christensen & Griffith Construction Company was Provo's contractor for a golf course being constructed on Provo City's land. In 1984 the State of Utah did a diking project along I-15 on the south side of Provo. Defendant Staker Paving & Construction Company was the State's contractor for the



diking project. Plaintiffs allege the diking project caused them damage.

B. Course of the Proceedings: The State of Utah moved for summary judgment on governmental immunity grounds. The motion was granted as to plaintiffs' claims and Staker's cross-claims. The Order was certified as a "final" Order pursuant to Rule 54(b). A timely appeal was perfected by plaintiffs and by Staker.

C. Disposition at Trial Court: The trial judge granted the State of Utah summary judgment and certified the Order as a "final" Order pursuant to Rule 54(b).

D. Relevant Facts with Citations to Record:

1. John D. Keyes was the project engineer for the Utah Lake Dike Project, the diking of I-15 just on the south side of Provo City. (Record, 484, Deposition of John D. Keyes, pp. 3-5. Hereinafter, references to Keyes' deposition will simply be to the particular page of Keyes' deposition, which is in the Record on appeal at page 484.)

2. The plans, specifications and design of the Utah Lake Dike Project were put together by the State of Utah. (Keyes, p. 55.)

3. It was not part of Staker's contract to do anything about the condition of the pre-existing culverts. (Keyes, p. 68.)

4. There was pre-existing sediment in the culverts.  
(Keyes, pp. 69-71.)

5. Staker's work had to be inspected by the State of Utah and had to pass inspection. (Keyes, pp. 73-74.)

6. On July 3rd, 1984, the State of Utah did conduct a final inspection of Staker's work on the Utah Lake Dike Project. A few minor deficiencies were noted with respect to pavement patching along the shoulder, placement of reflectors, etc., but none of the items noted on the final inspection had anything to do with the extension of the culverts. (Keyes, pp. 75-76.)

7. On May 13, 1985, Provo City and Christensen & Griffith Construction Company sued the State of Utah and Staker Paving and Construction Company for alleged property damage associated with the dike work. (Record, 1.)

8. On July 15, 1985, Staker Paving and Construction Company cross-claimed as against the State of Utah for indemnification and contribution. (Record, 22.)

9. On September 21, 1987, the State of Utah moved for summary judgment against plaintiffs' claims and Staker's cross-claims. (Record, 180.)

10. On December 2, 1987, the trial court granted the State's motion as against the plaintiffs' claims. (Record, 360).

11. On January 4, 1987, the trial court granted the State's motion as against Staker's cross-claims. (Record, 410, 415.)

12. On February 8, 1988, the trial court certified its Order granting the State of Utah's Motion for Summary Judgment as a final appealable Order. (Record, 415, 432.)

#### 8. SUMMARY OF ARGUMENT<sup>1</sup>

Utah Code Ann. § 63-30-3 does not provide the State of Utah immunity from Staker's contribution and indemnification claims over against the State of Utah. It has always been the law of the State of Utah that equitable claims are not subject to governmental immunity. In this case, Staker Paving & Construction Company performed pursuant to plans, specifications, and designs provided by the State of Utah. The State of Utah had a Project Engineer who was daily on the work site and

---

<sup>1</sup>The position of Staker Paving & Construction Company is that Utah Code Ann. § 63-30-3 provides both the State of Utah and Staker Paving & Construction Company, as an employee of the State of Utah, absolute immunity from plaintiff's claims herein. The lower court has ruled that § 63-30-3 does provide the State of Utah absolute immunity. Whether this ruling of the lower court is correct will be fully briefed by the other parties to this consolidated appeal, and if this Court decides that § 63-30-3 does not provide the State absolute immunity, the decision would apply likewise to the State's summary judgment as to Staker's cross-claim.

directed and supervised the work of Staker. At the conclusion of Staker's work, the State of Utah performed a final inspection of Staker's work, and Staker's work met the plans, specifications, and designs of the State of Utah in all material respects herein. On these facts, it would be inequitable for the State of Utah to be immune from Staker's contribution and indemnification claims over against the State of Utah.

#### 9. ARGUMENT

In El Rancho Enters, Inc. v. Murray City Corp., 565 P.2d 778 (Utah 1977) the Court noted that "the common law exception to governmental immunity pertaining to equitable claims has long been recognized in this jurisdiction." Id. at 779. The El Rancho Court discussed Utah Supreme Court cases dating back to the year 1901 which have so held. In Bowles v. State, 652 P.2d 1345, 1346 (Utah 1982) the Court again held that governmental immunity is not a defense to equitable claims.

Contribution is an equitable claim.

The Doctrine is not founded on, nor does it arise from, contract, but is founded on principles of equity and natural justice and comes from the application of principles of equity to the condition in which the parties are found in consequence of some of them, as between themselves, having done more than their share in performing a common obligation.

18 C.J.S. Contribution § 2, p. 3 (1939) (footnote omitted).

Indemnity is likewise an equitable claim. The Restatement (Second) of Torts § 886B (1979) recognizes that "the basis for indemnity is restitution, and the concept that one person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay." Id. § 886B, Comment c. Comment c goes on to explain that "[t]he unexpressed premise has been that indemnity should be granted in any factual situation in which, as between the parties themselves, it is just and fair that the indemnitor should bear the total responsibility . . . ."

Staker Paving & Construction Company's claims against the State of Utah are for contribution and/or indemnification on the theory that Staker's conduct was pursuant to the plans, specifications and designs of the State of Utah, the State of Utah directed and controlled Staker's work, and the State of Utah inspected, approved and accepted Staker's work. If Staker has any liability to plaintiffs, Staker should, in equity and good conscience, be entitled to contribution and/or indemnification from the State of Utah. The trial judge erred in granting the State of Utah summary judgment as to the claims for contribution and/or indemnification of Staker Paving & Construction Company.

CONCLUSION

Governmental immunity does not apply to equitable claims. The claims of Staker Paving & Construction Company against the State of Utah are equitable claims. The trial judge erred in granting the State of Utah summary judgment as to the claims of Staker Paving & Construction Company.

STATEMENT OF PRECISE RELIEF SOUGHT

The precise relief sought by Staker Paving & Construction Company is that the Order granting the State of Utah Summary Judgment against Staker be set aside and that the claims of Staker against the State of Utah proceed to a jury trial.

DATED this 28th day of April, 1988.

SNOW, CHRISTENSEN & MARTINEAU

By



Robert H. Henderson  
Attorneys for Staker Paving &  
Construction Company

SCMRHH206

ADDENDUM

<u>TAB</u>	<u>DESCRIPTION</u>
A	January 15, 1988 Order appealed from
B	Certification as a Final Order signed February 8, 1988 and entered February 11, 1988
C	Judge Harding's December 2, 1987 Memorandum Decision
D	Judge Harding's January 4, 1988 Memorandum Decision

Tab A



EXHIBIT "A"

FILED  
FOURTH JUDICIAL DISTRICT COURT  
OF UTAH

1988 JAN 15 PM 3:49

WILLIAM F. ROY, CLERK

CARMAN E. KIPP  
ROBERT H. REES  
KIPP AND CHRISTIAN, P.C.  
ATTORNEYS FOR State of Utah  
CITY CENTRE I, #330  
175 EAST 400 SOUTH  
SALT LAKE CITY, UTAH 84111-2314  
(801) 521-3773

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,  
STATE OF UTAH

---

PROVO CITY CORPORATION, a	:	
municipal corporation of the	:	
State of Utah and Christensen	:	ORDER GRANTING DEFENDANT
& Griffith Construction	:	STATE OF UTAH'S MOTION
Company,	:	FOR SUMMARY JUDGMENT
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
STATE OF UTAH, by and	:	
through its Department of	:	
Transportation and Staker	:	Civil No. 69608
Paving and Construction	:	
Company,	:	
	:	
Defendants.	:	

---

On September 22, 1987, defendant State of Utah filed a motion for summary judgment against plaintiffs on their complaint and against defendant Staker Paving and Construction Company on its cross-claim. On or about October 19, 1987, defendant Staker Paving and Construction Company filed a motion for summary judgment against plaintiffs. Plaintiff Provo City

Corporation responded to defendant State of Utah's motion on October 16, 1987, and Plaintiff Christensen & Griffith Construction Company responded on November 2, 1987. Defendant State of Utah filed, on October 27, 1987, a reply memorandum addressing plaintiff Provo City's memorandum and an additional reply memorandum filed on November 18, 1987, addressing plaintiff Christensen & Griffith Construction Company's memorandum. Having read all five memoranda, and having researched the applicable law, and for the reasons set forth in the court's two memorandum decisions dated December 2, 1987 and January 4, 1988, the court being fully advised in the premises and good cause appearing hereby orders, adjudges, and decrees as follows:

1. Under §63-30-3, U.C.A. (1953 as amended), defendant State of Utah is entitled to immunity from the claims asserted against it in this case.

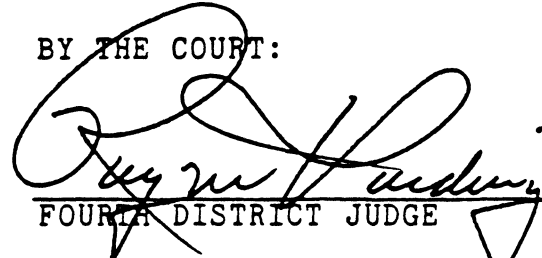
2. Defendant State of Utah's motion for summary judgment is hereby granted in total, and plaintiffs' complaint is hereby dismissed with prejudice and upon the merits, and the cross-claim of Staker Paving and Construction Company is hereby dismissed with prejudice and upon the merits.

3. Because there remains a question of fact as to whether or not defendant Staker Paving and Construction Company


acted only as directed by the State of Utah, defendant Staker Paving and Construction Company's motion for summary judgment is hereby denied.

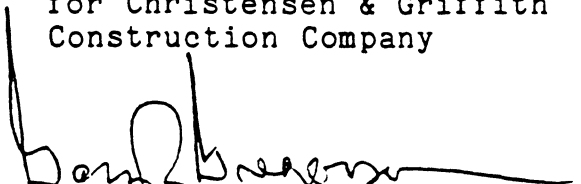
DATED this 15<sup>th</sup> day of January, 1988.


BY THE COURT:

  
FOURTH DISTRICT JUDGE

Approved as to form:

 Jan. 13, 1988  
BRUCE RICHARDS, Attorney  
for Christensen & Griffith  
Construction Company

  
GARY GREGERSON, Attorney  
for Provo City Corporation

 12 JAN 1988  
ROBERT HENDERSON, Attorney  
for Staker Paving and  
Construction Company

STATE OF UTAH  
COUNTY OF UTAH

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF UTAH COUNTY, UTAH, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND FULL COPY OF THE ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH.

WITNESS MY HAND AND SEAL OF SAID COURT THIS

2 DAY OF March 1988  
WILLIAM F. HUSH, CLERK

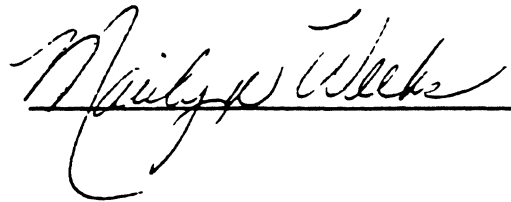


**CERTIFICATE OF MAILING**

MAILED, postage prepaid, this 12 day of January, 1988, true and correct copies of the foregoing Order Granting Defendant State of Utah's Motion for Summary Judgment, to the following:

Gallegos Construction Company  
P.O. Box 14547  
Salt Lake City, Utah 84118-0547

Kevin P. McBride  
STRONG & HANNI  
Attorneys for Third-Party  
Defendant Hikiau Construction  
Sixth Floor - Boston Building  
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "Kevin P. McBride", is written over a horizontal line.

Tab B

EXHIBIT "B"

FILED  
FOURTH JUDICIAL DISTRICT COURT  
OF UTAH COUNTY, STATE OF UTAH

1988 FEB 11 AM 11:22

WILLIAM F. HUGHES, CLERK  
DEPUTY

GARY L. GREGERSON (#1254)  
Attorney for Plaintiff Provo City  
P.O. Box 1849  
Provo, Utah 84603  
(801) 379-6149

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH

PROVO CITY CORPORATION,  
a municipal corporation  
of the State of Utah and  
CHRISTENSEN & GRIFFITH  
CONSTRUCTION COMPANY,

Plaintiffs,

vs.

STATE OF UTAH, by and  
through its Department  
of Transportaion, and  
STAKER PAVING AND  
CONSTRUCTION COMPANY,

Defendants.

Civil No. 69608  
Judge Ray M. Harding

STATE OF UTAH,

Third-party  
Plaintiff,

vs.

GALLEGOS CONSTRUCTION  
COMPANY AND HIKIAU  
CONSTRUCTION COMPANY,

Third-party  
Defendants.

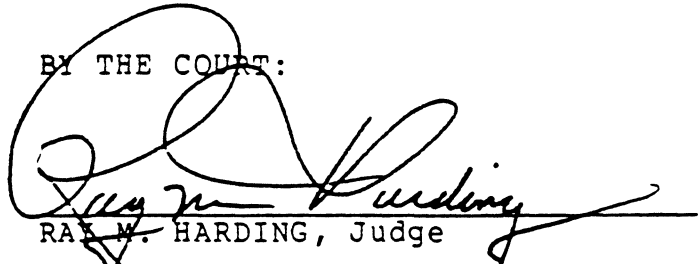
CERTIFICATION OF ORDER  
GRANTING STATE OF UTAH'S  
SUMMARY JUDGMENT MOTION AS  
A FINAL APPEALABLE ORDER

Pursuant to Rule 54(b) of the Utah Rules of Civil  
Procedure, the Order dated and entered January 15, 1988

granting the State of Utah's SUMMARY JUDGMENT MOTION and dismissing State of Utah as a party defendant in the above-captioned matter is hereby certified as a final appealable order as provided for in Rule 3(a) of the Utah Rules of Appellate Procedure against defendant State of Utah only. There is no just reason for delay of the appeal notwithstanding the existence of claims remaining against defendant Staker Paving.

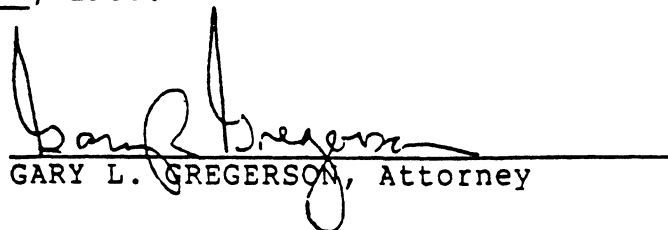
DATED this 8th day of Feb, 1988.

BY THE COURT:

  
RAY W. HARDING, Judge

CERTIFICATE OF MAILING

Mailed a copy of the foregoing Certification of Order Granting State of Utah's Summary Judgment Motion as a Final Appealable Order to Gallegos Construction Company, P.O. Box 14547, Salt Lake City, Utah 84118-0547; to Carmen K. Kipp, 175 East 400 South, #330, Salt Lake City, Utah 84111; to Robert H. Henderson, P.O. Box 45000, Salt Lake City, Utah 84147-4500; to Bruce L. Richards, P.O. Box 26786, Salt Lake City, Utah 84126-0786 and to Kevin P. McBride, Sixth Floor Boston Building, Salt Lake City, Utah 84111, postage prepaid, this 26th day of January, 1988.

  
GARY L. GREGERSON, Attorney

Tab C



EXHIBIT "C"

IN THE FOURTH JUDICIAL DISTRICT COURT  
OF THE STATE OF UTAH, IN AND FOR UTAH COUNTY

\*\*\*\*\*

PROVO CITY CORPORATION, a  
municipal corporation of the  
State of Utah and CHRISTENSEN  
& GRIFFITH CONSTRUCTION CO.,

Plaintiff,

CASE NUMBER 69,608

-vs-

RAY M. HARDING, JUDGE

STATE OF UTAH, by and through  
its Department of Transporta-  
tion, and STAKER PAVING AND  
CONSTRUCTION COMPANY,

Defendant.

**MEMORANDUM DECISION**

STATE OF UTAH,

Third-Party Plaintiff,

-vs-

GALLEGOS CONSTRUCTION COMPANY  
and HIKIAU CONSTRUCTION COMPANY,

Third-Party Defendants.

\*\*\*\*\*

On September 22, 1987, the defendant filed a Motion for Summary Judgment to which plaintiff, Provo City, responded on October 16, 1987, and plaintiff, Christensen and Griffith Construction responded on November 2, 1987. The defendant then filed on October 27, 1987, a reply memorandum addressing plaintiff Provo City's memorandum and an additional reply memorandum filed on November 18, 1987, addressing plaintiff Christensen and Griffith Construction's memorandum. Having read all five memoranda and having researched the applicable law, the Court finds that under section 63-30-3, UCA, as amended 1953, the State of Utah is entitled to immunity and therefore grants the Motion.

Section 63-30-3, UCA, second paragraph, states:

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

The plain meaning of this statute indicates that the State of Utah is immune from suit for any injury or damage resulting from the construction, repair, and operation of flood control systems whether such systems contain flood waters are not. Immunity is therefore granted whether damage is caused from the release of flood waters or from the impoundment of flood waters behind a flood control dam. Furthermore that immunity applies even if damages occur because of water buildup behind cofferdams, causing flooding, and even if it is alleged that the structure's actual purpose is for collateral benefits besides flood control. [See, Portis v. Folk Construction Co., 694 F. 2d 520 (Eighth Cir. 1982), Pierce v. United States, 650 F. 2d 202 (Ninth Cir. 1981). Although these cases interpreted a federal immunity statute, the Court found their reasoning persuasive in making its decision.]

After considering all affidavits filed in this action and after taking judicial notice of flood conditions that were generally known within this Court's territorial jurisdiction during the year in question, this Court finds (as found in Portis, supra 522 on summary judgment), that there can be no serious question but that the actions taken by the State of Utah were part of a flood control project. The Court therefore finds that any damages caused by those actions are immune from suit.

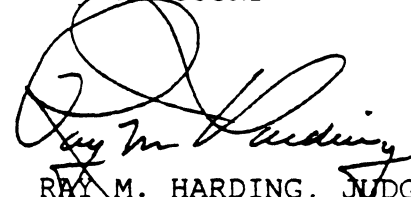
Some argument was made claiming that sections 63-30-8 and 63-30-9, UCA as amended, take precedence to waive any immunity granted in section 63-30-3. However, it must be noted that 63-30-3 was enacted subsequent to these latter sections and the rule of interpretation is that later enactments take precedent over prior enactments insofar as the two are plainly inconsistent. See, Pride Club v. Miller, 572 P.2d 385 (Utah 1977). Applying this rule, the Court finds that sections 63-30-8, and 63-30-9 have no application to the specific situations delineated in section 63-30-3.

The plaintiffs also argued that there is an issue as to applicability of section 63-30-3 to the present case. The cause of action in this case, whether in tort or in contract, did not arise until damages were sustained. The statute's effective date was March 29, 1984 and there is no question that the damages giving rise to this action occurred thereafter. Consequently, section 63-30-3 applies to this action and the suit against the State of Utah is barred.

Counsel for defendant, State of Utah, to prepare an order incorporating the terms of this decision and submit it to opposing counsel for approval as to form prior to filing with the Court for signature.

Dated this 2nd day of December, 1987.

BY THE COURT:

  
RAY M. HARDING, JUDGE

cc: Bruce L. Richards, Esq.  
Gary L. Gregerson, Esq.  
Robert H. Henderson, Esq.  
Kevin P. McBride, Esq.  
Carman E. Kipp, Esq./Robert H. Rees, Esq.

Tab D

EXHIBIT "D"

IN THE FOURTH JUDICIAL DISTRICT COURT  
OF THE STATE OF UTAH, IN AND FOR UTAH COUNTY

\*\*\*\*\*

PROVO CITY CORPORATION, a  
municipal corporation of the  
State of Utah and CHRISTENSEN  
& GRIFFITH CONSTRUCTION CO.,

Plaintiff,

CASE NUMBER 69,608

-vs-

RAY M. HARDING, JUDGE

STATE OF UTAH, by and through  
its Department of Transporta-  
tion, and STAKER PAVING AND  
CONSTRUCTION COMPANY,

Defendant.

**MEMORANDUM DECISION**

STATE OF UTAH,

Third-Party Plaintiff,

-vs-

GALLEGOS CONSTRUCTION COMPANY  
and HIKIAU CONSTRUCTION COMPANY,

Third-Party Defendants.

\*\*\*\*\*

The Court has received several letters concerning its Memorandum Decision filed on December 2, 1987, and in response thereto now grants the State of Utah's Motion For Summary Judgment in total and dismisses Staker Paving's Cross-Claim against the State of Utah. The Court also notes that Staker Paving's Motion For Summary Judgment has been submitted for determination and herein denies the Motion.

Section 63-30-3, UCA, second paragraph, states:

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

Unlike this section's first paragraph, this second paragraph grants to governmental entities and their employees immunity from suit for any injury or damage resulting from the construction, repair, and operation of flood control systems. In order for Staker Paving to be immune from liability, it must be considered an "employee" under section 63-30-3's, UCA, second paragraph.

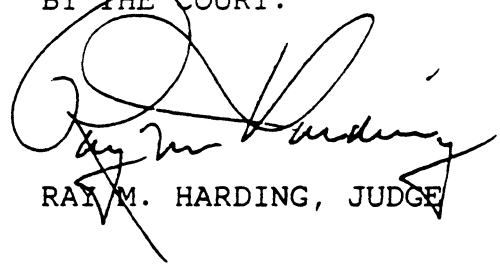
Section 63-30-2(4), UCA, defines employee as: "any officer, employee, or servant of a governmental entity. . . ." The bulk of case authority describes a servant as someone or some entity under the physical direction or control of the employer. 38A Words and Phrases 462 (1967). While the State did not ostensibly have power to control Staker Paving's day to day operations and may therefore be classified as an independant contractor, the Court is persuaded that so long as Staker Paving followed the State's specifications then it was a servant or employee under the statute. [This comports with the analysis in Portis v. Folk Construction Co., 694 F. 2d 520 (Eighth Cir. 1982), Pierce v. United States, 650 F. 2d 202 (Ninth Cir. 1981).] However, any deviation contrary to the State's directions would expose them to liability for damages to third persons. Consequently, it is an issue of fact whether or not Staker Paving has acted only as directed by the State. Staker's Motion is therefore denied.

Under the doctrine of respondeat superior, the State as master is only derivatively liable for acts within the course of a servant's employment and within the scope of the servant's authority. Consequently, since State of Utah is immune for any such acts, Staker Paving's Cross-Claim is dismissed.

Counsel for defendant, State of Utah, to prepare an order incorporating the terms of this decision and submit it to opposing counsel for approval as to form prior to filing with the Court for signature.

Dated this 4th day of January, 1988.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Ray M. Harding", is written over the printed name. The signature is fluid and cursive.

RAY M. HARDING, JUDGE

cc: Bruce L. Richards, Esq.  
Gary L. Gregerson, Esq.  
Robert H. Henderson, Esq.  
Kevin P. McBride, Esq.  
Carman E. Kipp, Esq./Robert H. Rees, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing Brief of Defendant/Appellant to the following on the 28th day of April, 1988.

Bruce L. Richards  
Bruce L. Richards & Associates  
Attorneys for Christensen &  
Griffith Construction  
P. O. Box 26786  
Salt Lake City, Utah 84126-0786

Kevin P. McBride  
Strong & Hanni  
Attorneys for Hikiau Construction  
Sixth Floor Boston Building  
Salt Lake City, Utah 84111

Gary Gregerson  
Attorney for Provo City  
359 West Center  
P. O. Box 1849  
Provo, Utah 84601

Carman E. Kipp  
Robert H. Rees  
Kipp and Christian, P.C.  
Attorneys for State of  
Utah and DOT  
175 East 400 South, #330  
Salt Lake City, Utah 84111-2314

Gallegos Construction Company  
P. O. Box 14547  
Salt Lake City, Utah 84118-0547

  
\_\_\_\_\_  
Robert H. Henderson